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No. 06-1068

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IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON AND BARRY S. WILSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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This Supplemental Brief responds to three briefs of *amici curiae*: the Chamber of Commerce of the United States ("the Chamber"), the Product Liability Advisory Council, Inc. ("PLAC") and the Alliance of Automobile Manufacturers/National Association of Manufacturers ("the AAM").

Amici purport to address Question 1 (whether the punitive damages award deprived Ford of "fair notice" due to the alleged vagueness of California law) and Question 2 (whether the California courts misapplied the "reprehensibility" analysis), and do not address Question 3, or the proposed remand in light of *Philip Morris* advocated in Petitioner's Supplemental Brief. But what *amici* actually do is advocate substantive Due Process limitations—ones *not* advocated in Ford's Petition—*prohibiting* punitive damages in a product liability case if the defendant (1) has complied with federal regulatory standards, and/or (2) can establish a dispute among experts about the design decisions in question. As we first show, Ford's Petition does not properly present those issues. And in any event, *amici* demonstrate no reason why certiorari should be granted.

I.

THE ISSUES *AMICI* RAISE ARE NOT PROPERLY PRESENTED.

A. The Petition Does Not Assert, And Ford Did Not Claim Below, That The Constitution Bars Punitive Damages If A Defendant Complied With Federal Regulatory Standards, And/Or If Experts Disagree About A Product's Safety.

The Chamber asserts that, as a matter of federal Due Process, punitive damages may not be imposed "[w]here . . . a defendant's challenged conduct complies with relevant government and industry safety standards." Chamber Br. 5; *see also id.* at 4 ("States may [not] *punish* motor vehicle manufacturers notwithstanding compliance with federal motor vehicle safety standards" (emphasis in original)).

Likewise, the AAM argues that, because Ford allegedly "had ample basis (including the support of . . . the federal government) for concluding that its designs were reasonable," it "cannot constitutionally be punished here." AAM Br. 12.

The AAM also contends that the Explorer's design features "were the subject of genuine debates in the engineering community about how to best balance performance and safety," and that because "reasonable people could differ concerning whether the benefits of the designs outweighed their risks," punitive damages are precluded. *Id.* Similarly, PLAC argues that punitive damages are barred "when there is a genuine dispute among experts at the time that design decisions are being made." PLAC Br. 10 n.4.

Ford made *state law-based* arguments to this effect in the California courts. But it did not preserve a claim that the federal Constitution itself prohibited punitive damages if the relevant design decisions complied with federal regulations or were the subject of disagreements among experts. *See* Brief in Opposition ("Br. Opp.") 6. Nor does Ford's Petition make such arguments. To the extent *amici* advocate a substantive federal Due Process prohibition against punitive damages where a product complies with federal regulations or experts disagree about its design, those issues were not properly preserved and are not presented by Ford's Petition.

B. Ford Did Not Preserve The Repackaging Of Those Arguments As A "Fair Notice"/ Vagueness Issue.

The *amici* also present their "regulatory compliance" and "expert disagreement" arguments as problems of "fair notice" and vagueness under the Due Process Clause. Unlike the substantive Due Process arguments discussed above, this contention *does* appear in Ford's Petition. However, the argument was not properly preserved, for Ford did not include it as an Issue Presented in its Petition for Review to the California Supreme Court. Br. Opp. 4-6. Accordingly, it is not before this Court.

C. The Petition Repackages The "Regulatory Compliance" And "Expert Disagreement" Arguments In Terms Of "Reprehensibility," But That Issue Was Not Preserved Either.

In addition, *amici* contend that, as a matter of federal constitutional law, "compliance with regulations" and "disagreements among experts" are defenses to a contention that a defendant's conduct was "reprehensible." Once again, however, Ford did not present that argument to the California Court of Appeal as an issue of federal constitutional law. Instead, Ford raised it only as an issue of state law. Br. Opp. 6. As with the other issues discussed by *amici*, this contention is not properly before the Court.

II.

THE "FAIR NOTICE"/VAGUENESS ARGUMENT PRESENTS NO ISSUE MERITING CERTIORARI.

Like Ford, *amici* attempt to shoehorn their contentions that compliance with federal regulations and/or the existence of a dispute among engineers about the adequacy of a manufacturer's design decisions altogether bars a punitive damages award into a federal Due Process "fair notice"/vagueness argument. Thus, *amici's* briefs repeat arguments, founded on state law, that they made to the California Court of Appeal, and cite *some* decisions—again, decisions based on state law—that support them. But, like Ford, *amici* cite no case holding that the federal Due Process Clause requires a state to make compliance with regulations or a dispute among experts an absolute defense to a punitive damages claim. *See* Br. Opp. 13.[1]

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[1]For example, the Chamber's brief (at 3,7) cites the following cases, all of which apply state law, rather than federal constitutional law: *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1316-17 (5th Cir. 1995) (Mississippi law); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048,

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In fact, California law is not vague on this issue: in California, as in most states, neither a disagreement among experts nor compliance with federal regulations is an absolute bar to punitive damages. *See* Br. Opp. 11. On the other hand, those are *relevant* factors, and nothing in the Court of Appeal's decision precludes a defendant from presenting evidence that it complied with regulations or that there was a dispute among engineers or other experts over safety issues relating to the product's design.[2] *Id.* Indeed, Ford *did*

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1058 & n.20 (11th Cir. 1994) (Alabama law); *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) (Missouri law); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 855-56 (10th Cir. 1986) (Colorado law); *Brand v. Mazda Motor Corp.*, 978 F. Supp. 1382, 1394-95 (D. Kan. 1997) (Kansas law); *Welch v. Gen. Motors Corp.*, 949 F. Supp. 843, 844-46 (N.D. Ga. 1996) (Georgia law); *Boyette v. L.W. Looney & Son, Inc.*, 932 F. Supp. 1344, 1347-48 (D. Utah 1996) (Utah law); *Sloman v. Tambrands, Inc.*, 841 F. Supp. 699, 703 n.8 (D. Md. 1993) (Maryland law); *Miles v. Ford Motor Co.*, 922 S.W.2d 572, 589-90 & n.7 (Tex. App. 1996), *aff'd in part, rev'd in part on other grounds*, 967 S.W.2d 377 (Tex. 1998) (Texas law); *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (Georgia law); *American Cyanamid Co. v. Roy*, 498 So. 2d 859, 862-63 (Fla. 1986) (Florida law); *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 826 (Fla. 1986) (Florida law). The same is true for all the cases cited in PLAC's brief at 9 n.3: *Satcher*, 52 F.3d at 1317 (discussed above); *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993) (Iowa law); *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 618 (Iowa 2000) (Iowa law); *Owens-Corning Fiberglas Corp. v. Garrett*, 682 A.2d 1143, 1161-68 (Md. 1996) (Maryland law); *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 99-100 (Iowa 1994) (Iowa law); *Loitz v. Remington Arms Co.*, 563 N.E.2d 397, 407 (Ill. 1990) (Illinois law). Finally, the AAM's brief just cites some of the cases cited in the other *amici* briefs. *See* AAM Br. 13.

[2] *Amici's* statements that the Court of Appeal held "that compliance with federal safety standards is *irrelevant* to determining whether punitive damages are warranted" (Chamber Br. 2 (emphasis added); *see also id.* at 4), "rejected reliance on contemporaneous expert opinion as a factor to be considered" (PLAC Br. 10), and "deemed those factors [com-

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present evidence (which Plaintiffs disputed) that the Explorer complied with the one applicable federal regulatory standard. *Id.* There is therefore nothing about California punitive damages law that *amici*—or the hypothetical automobile maker of common intelligence—cannot understand.

In fact, California's punitive damages statute is far more detailed and specific than the statutes upheld against vagueness challenges in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 465-66 (1993), and in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 19-20, 24 n.12 (1991). *See* Br. Opp. 13-14. Yet none of the *amici* even mention those holdings[3] or the more particularized nature of the California statute.

Any automobile manufacturer familiar with California law would know that it might be liable for compensatory and punitive damages if it manufactures a vehicle that (1) rolls

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pliance with regulations and genuine debate in the engineering community about the design tradeoffs] completely irrelevant" (AAM Br. 9) are false and distort the opinion below.

The AAM also quotes the opinion's statement that "'compliance with industry standards or custom [i]s *irrelevant* . . . to punitive damages.'" *Id.* at 11 (emphasis added to opinion by AAM). However, the Petition presents no issue of whether the Constitution requires states to allow, as a defense to punitive damages, evidence that "everybody else does it too." Nor did Ford make any such argument below. *See* Br. Opp. 7. Instead, Ford argued that the trial court erred, as a matter of state law, in refusing to allow it to present statistical evidence that some vehicles made by other companies had comparable rollover rates. *See* Br. Opp. 7-8. Moreover, because the Court of Appeal held that this evidence was not only irrelevant, but also inadmissible under state law as "unreliable and misleading" (Pet. App. 23a), the evidence's exclusion rests upon an adequate and independent state ground. *See* Br. Opp. 8.

[3]PLAC's discussion of the vagueness issue does cite Justice O'Connor's dissent in *Haslip* (PLAC Br. 6), without even mentioning the majority's rejection of the vagueness argument.

over in normal, foreseeable conditions, if the driver swerves to avoid an obstacle; (2) has a roof that is so weak that it will collapse during a rollover; (3) could have been made more stable and given a stronger roof through well-known, available and cost-effective design changes, if the manufacturer knows of these defects, and reasonable solutions, but—over an extended period of time—repeatedly chooses not to make the vehicle safe from rollover for profit-maximization reasons. Accordingly, the decision below presents no issue of Due Process or fair notice.[4]

III.

THE OPINION'S ANALYSIS OF "REPREHENSIBILITY" PRESENTS NO ISSUE MERITING CERTIORARI.

Like Ford, *amici* attempt to recycle state law arguments they presented in the California courts that the Due Process Clause compels the conclusion that compliance with federal regulations, and/or the existence of a disagreement among engineers, *conclusively* establishes that the defendant's conduct was not "reprehensible." We emphasize the word "conclusively" because, as already shown, California law permits a defendant to present evidence as to these factors, and to argue that they negate or at least reduce the degree of reprehensibility. *See* p. 4-5, *supra*; Br. Opp. 15. Indeed, both the trial judge and the Court of Appeal considered Ford's arguments about diminished reprehensibility,

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[4]Given this record and the findings of the California courts, it is wholly incorrect to characterize this case as one where punitive damages were imposed simply because "Ford knowingly (*i.e.*, intentionally) mass produced a product that entailed some risk of harm." PLAC Br. 14. As the Brief in Opposition explains, the Court found Ford's misconduct "repeated" not because it mass-manufactured the Explorer, but because it repeatedly made design choices that sacrificed safety for profits and production schedules. *See* Br. Opp. 9-10 & n.6; *id.* at 23.

and each substantially reduced the punitive damages award. *Id.*

But as the Court of Appeal's opinion explained (Pet. App. 46a-50a), and the Brief in Opposition demonstrates, there were good reasons why those arguments did not completely eliminate the punitive damages award. *First*, there are no federal standards for stability. Br. Opp. 15. *Second*, there are no federal standards for roof-strength warnings, another ground for liability. *Id. Third*, there was a serious factual dispute as to whether Ford complied with the one applicable federal regulation at issue, relating to roof structure (*id.* at 15 n.10)—a dispute that the Court must assume was resolved by the jury in Respondents' favor. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996). *Fourth*, Congress expressly made federal automobile design regulations non-preemptive, reflecting its judgment that the regulations should not preclude states from imposing stricter standards, and this non-preemption encompasses not only the imposition of liability for compensatory damages, but all common law remedies, including punitive damages. Br. Opp. 15-16. *Fifth*, there was *no* evidence of an internal debate or disagreement among Ford engineers as to the Explorer's design features, or that Ford's management relied on the advice of outside safety experts in rejecting internal engineering proposals that would have made the Explorer safer. *Id.* at 16.

Because they largely ignore these facts, *amici's* briefs are curiously disconnected from the actual facts of *this* case. For example, PLAC argues that a manufacturer "that cho[se] between experts with competing opinions on a particular safety feature" has not acted reprehensibly. PLAC Br. 16. Likewise, it says that a manufacturer who "'think[s] about risk in a systematic manner" and "undertake[s cost-benefit] calculations to ensure that there is appropriate risk balancing'" has not acted reprehensibly. *Id.* at 17 (citation omitted). But although *PLAC* says that any "manufacturer

inevitably confronts disagreement among experts about the benefits and relative costs of proposed safety features" (*id.* at 8), *Ford* presented no evidence that its decisionmakers made a choice "between experts," thought about risk "in a systematic manner" or undertook "cost-benefit calculations" in a good-faith effort to engage in "appropriate risk balancing."[5] See Br. Opp. 16. What limitations, if any, the Constitution places on punitive damage awards where such showings *are* made can be explored in a case that actually raises those issues.

IV.

NO GUIDANCE IS NECESSARY ON THE PROPER APPLICATION OF *STATE FARM* TO PRODUCTS LIABILITY CASES.

In the final section of its brief, PLAC contends that certiorari should be granted because application of the punitive damages guidelines set forth in *State Farm* has resulted in "eye-popping exactions regularly being upheld in product-liability cases." PLAC Br. 12. PLAC contends that these awards are the result of "systematic bias" due to the fact that "three of the five reprehensibility factors identified in *State Farm* are treated as present automatically in all product-liability cases in which punitive damages are imposed." *Id.*[6]

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[5]Similarly, the AAM asserts that "Ford demonstrated that its designs . . . were the subject of genuine debates in the engineering community about how to best balance performance and safety" (AAM Br. 12) but cites no evidence (and there is none) that when Ford's decisionmakers rejected its engineers' proposals to fix the Explorer's rollover problem and strengthen its roof structure, they did so based on an actual assessment of those "genuine debates."

[6]PLAC also contends that such awards duplicate compensatory awards "that often include[] a large punitive element in the form of increasingly large non-economic damages." PLAC Br. 4. But it ignores

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If these assertions were true, PLAC would have provided the Court with examples of gargantuan punitive damages awards upheld by appellate courts that gave only lip service to the reprehensibility analysis required by *State Farm*. Yet this portion of PLAC's brief does not cite a *single* case that supposedly exemplifies the need for the Court's guidance.[7] Aside from this case, the only decisions PLAC cites in its entire discussion of this issue are a concurring opinion in one case and three decisions on a collateral point mentioned only in a footnote: an unpublished decision of the Hawaii Court of Appeals, an unpublished District Court decision from Nevada and a California Court of Appeal decision. *See* PLAC Br. 12 n.5. This hodgepodge of decisions does not show a problem in the case law that warrants the Court's attention.[8]

Nor do products liability cases following *State Farm* demonstrate that outsized punitive damage awards go unreviewed by appellate courts. To the contrary, many post-*State Farm* product liability decisions involve very substantial

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the fact that the Court of Appeal in this case greatly reduced the non-economic damages upheld by the trial court in order to ensure that, as the opinion specified, "no punitive element remains." Pet. App. 41a.

[7]Similarly, PLAC cites no case to support its assertions that "breathtaking punitive awards are regularly imposed for products that satisfy extensive and detailed government regulations" (PLAC Br. 8 n.2) or that "the lower courts have consistently misapplied the ratio and comparative-penalties guideposts in product cases." *Id.* at 11.

[8]Moreover, what PLAC does say about punitive damages cases in other portions of its brief is incomplete and misleading. For example, PLAC describes a "$1 million penalty in the case of a fishbowl that shattered while being carried." PLAC Br. 4. PLAC neglects to state that this award was reduced to $403,416 on appeal. *See Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 577 (Or. Ct. App. 2003).

reductions in jury verdicts.[9] Other decisions affirm punitive damage awards, but only where the ratio to compensatory damages is not unduly high and the reprehensibility of the defendant's specific conduct warranted significant punishment.[10] In short, nothing about the lower courts' application of the *State Farm* guidelines in product liability cases warrants intervention by the Court.

Respectfully,

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[9] *See, e.g., Clark v. Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006) (84.3% reduction); *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (Cal. Ct. App. 2003) (over 90% reduction); *Waddill*, 78 P.3d at 574 (60% reduction); *Bocci v. Key Pharm., Inc.*, 76 P.3d 669 (Or. Ct. App.) (84.5% reduction), *modified on other grounds*, 79 P.3d 908 (Or. Ct. App. 2003).

[10] *See, e.g., Groth v. Hyundai Precision & Ind. Co.*, 149 P.3d 333, 337, 340 (Or. Ct. App. 2006) (upholding punitive damages award of 3.4 times compensatory damages where product did not meet industry guidelines and defendant "knew about the risk to the lives of workers and consciously—and deceptively—ignored that risk"); *Staskal v. Symons Corp.*, 706 N.W.2d 311, 314, 333 (Wis. Ct. App. 2005) (upholding punitive damages award of less than twice compensatory damages where defendant's conduct was "egregious"); *Sufix, U.S.A., Inc. v. Cook*, 128 S.W.3d 838, 843 (Ky. Ct. App. 2004) (upholding award approximately equal to compensatory damages where "manufacturer . . . cavalierly subject[ed] the public to an unreasonable risk of catastrophic injury").